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IN THE

Supreme Court of the United States

October Term, 1963

No. .....

A Quantity of Copies of Books, HAROLD THOMPSON and ROBERT THOMPSON, dba P-K NEWS SERVICE,

Appellants,

vs.

STATE OF KANSAS,

Appellee.

On Appeal From the Supreme Court of the State of Kansas.

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the Supreme Court of the State of Kansas entered on March 2, 1963, rehearing denied April 15, 1963, notice of appeal filed July 9, 1963, affirming the order, judgment and decree of a Judge of the District Court in and for the County of Geary, State of Kansas directing that certain books be turned over to the Sheriff of Geary County to be destroyed by the said Sheriff because found by the said Judge of the District Court to be in violation of the laws of the State of Kansas.

Opinions Below.

The opinion of the Supreme Court of the State of Kansas [R. 118-122][1] was divided, two Justices dissenting without opinion [R. 122]. The opinion is reported in 191 Kan. 13, 379 P. 2d 254. A copy of the opinion is attached hereto as Appendix A. The memorandum decision of the District Judge [R. 19-20] is unreported but is embodied at length in the aforesaid opinion of the Supreme Court of the State of Kansas attached hereto as Appendix A.

Jurisdiction.

This was an *in rem* proceeding instituted under the laws of Kansas (G. S. 1961 Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30) seeking the public destruction "by burning or otherwise" [R. 50] of certain specified books alleged to be "obscene, lewd and lascivious, manifestly tending to the corruption of the morals of any person or persons reading said books" [R. 50]. The judgment of the Supreme Court of the State of Kansas [R. 122] was entered on March 2, 1963 [R. 118], a due and timely motion for rehearing was denied on April 15, 1963 [R. 126], and notice of appeal was due and timely filed in the Supreme Court of the State of Kansas on July 9, 1963 [R. 127-135]. The jurisdiction of the Supreme Court to review this judgment rests upon 28 U. S. C. 1257(2). The judgment upheld the state statute against claims that on its face and as applied, the statute violated the Federal Constitution. The following decisions sustain the jurisdiction of the Su-

[1]The reference "R" is to the transcript of the record prepared and certified by the Clerk of the court below and on file in this Court.

preme Court to review the judgment on direct appeal in this case: *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58; *Marcus v. Search Warrant*, 367 U. S. 717; *Kingsley Books, Inc. v. Brown*, 354 U. S. 436; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U: S. 282.

Questions Presented.

1. Whether the statute (G. S. 1961 Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30), on its face and as construed and applied, by reason of the absence of a provision for a jury trial of the essential issues thereunder, and by reason of a denial of a jury trial in the cause herein despite appellants' requests duly made, renders the statute unconstitutional because the statute, on its face and as so construed and applied, abridges appellants' exercise of freedoms of speech and press, arbitrarily deprives appellants of their liberty and property without due process of law, and discriminatorily denies appellants the equal protection of the laws contrary to the free speech and press, due process and equal protection provisions of the First and Fourteenth Amendments to the United States Constitution.

2. Whether the statute (G. S. 1961 Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30), on its face, and as construed and applied to authorize the search and seizure of the books herein involved, constitutes a prior restraint on the circulation of books including the books involved herein, thereby abridging the exercise of freedoms of speech and press including appellants' exercise thereof, all protected by the free speech and press provisions of the First Amendment and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

3. Whether the statute (G. S. 1961 Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30), on its face, and as construed and applied to authorize the search and seizure of the books herein involved, deprives appellants of the right to be secure against unreasonable searches and seizures protected by the provisions of the Fourth Amendment and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

4. Whether the statute (G. S. 1961 Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30), as construed and applied to authorize the search, seizure and destruction of the books herein involved by applying solely the contemporary standards of the community of Junction City, Kansas in judging the alleged obscenity of the books, abridges appellants' exercise of freedoms of speech and press protected by the free speech and press provisions of the First Amendment and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

5. Whether the statute (G. S. Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30), as construed and applied to authorize the search, seizure and destruction of the books herein involved without proof that the books go substantially beyond customary limits of candor in the description or representation of matters pertaining to sex and nudity and without proof in addition that the books appeal to the prurient interest of the average person, abridges appellants' exercise of freedoms of speech and press, arbitrarily deprives appellants of liberty and property without due process of law, and discriminatorily deprives appellants of the equal protection of the laws, all in violation of the free speech and press provisions of the First Amendment and the due

process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

6. Whether the statute (G. S. 1961 Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30), on its face, and as construed and applied to authorize the search, seizure and destruction of the books herein upon the ground that the books violate the statute, abridges the exercise of freedoms of speech and press including appellants' exercise thereof, protected by the free speech and press provisions of the First Amendment and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

7. Whether the statute (G. S. 1961 Supp. 21-1102 to 21-1102c, L. 1961, ch. 186, June 30), on its face, and as construed and applied, by failing to provide any ascertainable standards under which men of common intelligence can know what is or is not permissible; by failing to contain any requirement of scienter; by failing to provide for a jury trial and the denial of a jury trial duly requested by appellants; by authorizing a prior restraint on the circulation of books, including the books herein; by authorizing the search and seizure of books, including the books herein; by authorizing the search, seizure and destruction of the books herein involved, applying solely the contemporary standards of Junction City, Kansas, without any evidence that the books substantially exceed limits of candor in the description or representation of sex or nudity or appeal to the prurient interest of the average person, the uncontradicted record in fact showing that the books do not; and by ordering the destruction of the books as allegedly obscene in violation of the statute, all operates and operated to deprive appellants of freedoms of speech and press, arbitrarily

to deprive appellants of liberty and property without due process of law, and discriminatorily to deny appellants the equal protection of the laws, all in violation of the free speech and press provisions of the First Amendment, the search and seizure provisions of the Fourth Amendment, and the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fourth and Fourteenth Amendments to the Constitution of the United States, and the pertinent provisions of the General Statutes of Kansas (G. S. 1961 Supp. 21-1102, 21-1102c, L. 1961, ch. 186, sections 1, 4, June 30) are attached hereto as Appendix B.

Statement of the Case.

On July 25, 1961, an information, verified by William M. Ferguson, Attorney General of the State of Kansas, was filed in the District Court of Geary County, Kansas [R. 48-50]. The caption of the information was entitled in the name of the State, as plaintiff, against, a quantity of books, the specific titles of each of the books, fifty-nine in number, being set forth in the caption, together with the statement that each of the specified books had been published as "This is an original Night Stand Book" [R. 48-49]. The information alleged that P K News Service, located at 340 East 9th Street, Junction City, Kansas, possessed for sale and distribution on July 24, 1961, a quantity of paper-back books, "more particularly described by title in the caption hereof" [R. 49], which books allegedly contained "obscene, lewd and lascivious" lan-

guage and which books were in their entirety allegedly "obscene, lewd and lascivious, manifestly tending to the corruption of the morals of any person or persons reading said books" [R. 50], all as allegedly prohibited by the specified laws of Kansas.

The prayer of the information was that a warrant issue to the Sheriff of Geary County, Kansas, directing that the books be brought before the Court and that, after notice to the owner or other person in possession and control of said books of a hearing, and after such hearing, that the Court order the books publicly destroyed, by burning or otherwise [R. 50].

The information aforesaid having been executed by the Attorney General, an Assistant Attorney General was sent with the information for filing in Junction City, Kansas [R. 22]. On July 25, 1961, the information was filed in the District Court of Geary County, Kansas at about 5:00 P.M. [R. 22]. The Assistant Attorney General, accompanied by the County Attorney, then proceeded to the home of the Honorable Albert B. Fletcher, a Judge of the said Geary district Court, informed him of the information, and left seven books with him [R. 22].

At about 8:00 P.M. [R. 22] or 8:30 P.M. [R. 5], Judge Fletcher, the Assistant Attorney General and County Counsel met at the Court House [R. 22]. The Court's attention was called to certain pencilled references to certain sections in the seven books [R. 22]. Two of the seven books had pencilled notations and some had slips of paper in them with pencilled notations of page numbers on them [R. 23-24]. The Judge perused one or more of the books for a short period [R. 22]. The hearing lasted about 40 to 45 minutes [R. 23].

Judge Fletcher stated, on the said July 25, 1961, that he had "scrutinized seven volumes" [R. 5]—six listed in the information, while one was not—and concluded as follows:

> "The same appears to be obscene literature as defined under Chapter 186 of the Session Laws, 1961, and give this Court reasonable grounds to believe that any paper-backed publication carrying the following: 'This is an original Night Stand Book' would fall within the same category and would be contrary to said chapter of the Session Laws," [R. 5-6].

Based upon "the Information" and "the Court's scrutiny" [R. 6] of the said seven books, Judge Fletcher held that a search warrant should issue forthwith, and the Court set the matter for hearing for "the 7th day of August, 1961" [R. 6].

Thereupon, on the said July 25, 1961, a search warrant issued [R. 6-7]. The warrant recites that it appears from the Information that "quantities of lewd, lascivious and obscene books, more particularly described in the caption hereof" [R. 6] are possessed for sale and distribution at the specified address, and the command of the warrant is "forthwith to seize all copies of said described lewd, lascivious and obscene books and to bring said books before me at 10 o'clock A.M. on the 7th day of August, 1961, for a hearing then and there to be held to determine what further disposition shall be made of such books" [R. 6-7]. The command was further to search the premises and buildings for such books as aforestated [R. 7], and to leave a copy of the warrant and notice with the owner of the books, or with any agent on the premises, notifying the owner of the

hearing date on August 7, 1961, at which time the owner might show cause why the books seized should not be destroyed, by burning or otherwise [R. 7].

Accordingly on the next day, July 26, 1961, the search warrant was executed by searching the premises and seizing 1,715 books, being copies of 31 different titles [R. 7]. A copy of the warrant and notice of hearing was left with the bookkeeper at the P-K News Service premises [R. 7]. The return of the officer who executed the warrant recites: "The following is a list of the Titles and number of books having been published as 'This is an Original Nightstand Book,' seized and in my custody" [R. 8], followed by a list of the books containing the Publisher's number, the title of each book, and the quantity seized [R. 8].

How Federal Questions Are Presented.

On August 7, 1961, appellants filed their motion to quash the search warrant and Information [R. 9-11]. The grounds of the motion were that the statute on its face and as construed and applied to the books involved were in violation of the state and Federal constitutions [R. 9]; that the statute, on its face and as construed and applied, deprived appellants of their property without due process of law, denied them the equal protection of the laws and freedoms of speech and press, "all contrary to the provisions of the 14th Amendment of the Constitution of the United States and Sections 11 and 18 of the Bill of Rights of the Constitution of the State of Kansas" [R. 9]; that the books are not obscene, immoral, lewd or lascivious, nor contain such language, and were entitled to constitutional protection under the "1st and 14th Amendments to the Constitution of

the United States and Section 11 of the Bill of Rights of the Constitution of the State of Kansas" [R. 9].

It was further urged in the motion to quash that the statute failed to provide ascertainable standards, and that the breadth of the statutory language encompassed constitutionally protected books, and the statute therefore, on its face and as construed and applied, abridged freedoms of speech and press, deprived appellants of their property without due process of law and denied them the equal protection of the laws, all in violation of "the 14th Amendment of the Constitution of the United States and Section 18 of the Bill of Rights of the Constitution of the State of Kansas" [R. 8].

The motion also asserted that the statute permitted the seizure of books without prior notice to the owner and without hearing or determination that the seized books are obscene; that the procedures employed to seize the books herein involved operate "as a prior restraint on the circulation and dissemination of books" [R. 11]; that the statute does not provide a limitation upon the time within which a judicial decision must be made on the issue of obscenity, thereby arbitrarily depriving appellants of property without due process of law, denying them equal protection of the laws and freedom of speech and press, "all contrary to the 14th Amendment of the Constitution of the United States and Sections 11 and 18 of the Bill of Rights of the State of Kansas" [R. 11].

Finally, the motion to quash asserted that the statute on its face and as construed and applied to the books involved authorizing and requiring the seizure of the books is arbitrary and unreasonable and deprives appellants of their right to be secure against unreason-

able searches and seizures "secured by the 4th and 14th Amendments to the Constitution of the United States, and Section 15 of the Bill of Rights of the Constitution of the State of Kansas" [R. 11].

Following the filing of the said motion to quash on August 7, 1961, and on the same day, a hearing was held where appellants introduced evidence with respect to the manner in which the Information was executed and filed on July 25, 1961) the nature of the proceedings before Judge Fletcher on the same day in the evening; and identified the seven books which the court had scrutinized prior to the issuance of the search warrant, all as aforestated [R. 22-24]. Following oral argument, the court took the matter under advisement [R. 24].

On August 11, 1961, the Court ruled on the motion to quash [R. 24-28]. The District Court stated at the outset that the motion "goes to the procedure used by this Court and to the Act itself as construed in line with the 14th Amendment of the United States Constitution and the 11th and 18th Bill of Rights of the Constitution of the State of Kansas and also the 4th and 14th Amendment to the Constitution of the United States and the 5th Article of the Bill of Rights of the State of Kansas" [R. 24]. The Court held that the statute on its face did not deprive appellants of due process of law nor act as a prior restraint on the dissemination of publications [R. 26-27].

The court stated that due process was not violated by the procedures used to seize the books; that there was basis for the exercise of judicial discretion prior to the issuance of the search warrant when the court "read six—I beg your pardon—scrutinized six volumes,

all bearing the same notation 'Nightstand Publications'" [R. 27], and the District Court concluded "that the procedure and act done by this Court are sufficient so as not to violate the due process clause of the Constitution of the United States or of the State of Kansas and the search and seizure clause of the same, and the Court rules that the motion to quash the Information and Search Warrant shall be overruled" [R. 28].

Prior to the ruling of the court on the motion to quash on August 8, 1961, appellants moved the court for a continuance of the hearing on the merits in order to have a reasonable time to prepare their defense [R. 11-12], and thereupon the matter was continued for hearing on the merits to September 14, 1961 [R. 17].

On September 6, 1961, appellants filed a motion for jury trial [R. 12]. The appellants alleged that the standards for judging obscenity could only be applied by a jury, that "only by a jury trial of the essential issues herein presented can they be guaranteed the freedoms of speech and press through due process of law and equal protection of the law as provided by the First and Fourteenth Amendments to the Constitution of the United States and Sections 11 and 18 of the Bill of Rights of the Constitution of the State of Kansas" [R. 12].

On September 11, 1961, argument on appellants' motion for a jury trial was held, and the motion was on the said day overruled [R. 18]. Appellants renewed their motion to quash, and the said motion was also overruled [R. 18].

On September 14, 1961, the matter came on for trial [R. 18] before the said Honorable Albert B. Fletcher, a Judge of the District Court for Geary County,

Kansas. The State offered into evidence [R. 28] as Plaintiff's Exhibits 1 through 31, the books in question [R. 6]. Appellants objected to the introduction of the evidence on the constitutional grounds urged in support of their motion to quash [R. 9-11, 28; Tr. B-8-9].[2] The objection was overrruled [R. 28]. The State rested [R. 28].

Appellants demurred to the evidence, asserting that the State had failed to prove that the books exceeded "contemporary community standards" [R. 28; Tr. B-9-10, 11-16, 21-32]. The State urged that it was not possible to produce an "average man" from the "community of Junction City" [Tr. B-17] or elsewhere, or to obtain a sufficient number of witnesses in order for the Court to determine "what a community standard in the community is" [Tr. B-17]. The State averred that "the Judge of this Court, Your Honor, if you please, is a resident of some substantial length of time in this community and is presently and was at all times pertinent to this case a resident of this community. We're speaking of the City of Junction City, or Geary County" [Tr. B-18]. The State urged that the issue of community standards "is a matter of law" [Tr. B-18]. The State contended that the court was required to "make a legal decision; in other words, to apply to these books the knowledge of the Court which it's entitled to do, of the standards of the community in which the Court lives and works, to determine in the Court's mind what

[2]The reference "Tr." is to the Reporter's Transcript of proceedings in the District Court (2 volumes), certified by the Clerk of the court below, and on file in this Court. The transcript of proceedings of August 7, 8 and 11, 1961, in one volume, is referred to as "Tr.A"; the transcript of proceedings of September 11, 14 and 15, 1961, in the second volume, is referred to as "Tr.B."

is an average person in the community, because the State could never establish this by any stretch of the imagination" [Tr. B-20-21].

Appellants' demurrer to the evidence was overruled [R. 28].

The appellants called witnesses on their own behalf.[3] All were qualified to testify relative to the limits of candor in the community with respect to the description and representation of sex and nudity in books and other writings. Appellant offered into evidence a number of books, some twenty-nine in number, the property of the George Smith Public Library in Junction City, Kansas, and one book (*Tropic of Cancer*) which the librarian testified she wanted to purchase but which was too expensive, and another book, a copy of which belonged to the library but was lost.[4]

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[3]Lois York [R. 29-32], Librarian of the George Smith Public Library in Junction City, Kansas; Edward A. Howard [R. 32-35], Librarian at the Lawrence Public Library, in Lawrence, Kansas; Dr. Richard Lichtman [R. 35-37], Assistant Professor of Philosophy at the University of Kansas City; Joseph Rubinstein [R. 37-40], Assistant Professor of Bibliography and Librarian at the University of Kansas.

[4]Lawrence, *Lady Chatterley's Lover* [Deft. Ex. 1, R. 29]; *Memoirs of Hecate County* [Deft. Ex. 2, R. 29]; Wallace, *The Chapman Report* [Deft. Ex. 4, R. 29]; O'Hara, *From The Terrace* [Deft. Ex. 5, R. 29]; *Peyton Place* [Deft. Ex. 6, R. 29]; O'Hara, *Ten North Frederick* [Deft. Ex. 7, R. 30]; Joyce, *Ulysses* [Deft. Ex. 8, R. 30]; Jones, *From Here to Eternity* [Deft. Ex. 9, R. 30]; Wolfe, *The Magic of Their Singing* [Deft. Ex. 10, R. 30]; O'Hara, *A Rage to Live* [Deft. Ex. 11, R. 30]; Mergendahl, *The Bramble Bush* [Deft. Ex. 11, R. 30]; Borth, *The Sot Weed Factor* [Deft. Ex. 13, R. 30]; Anderson, *Winesberg, Ohio* [Deft. Ex. 14, R. 30]; Caldwell, *God's Little Acre* [Deft. Ex. 15, R. 30]; Jackson *The Fall of Valor* [Deft. Ex. 16, R. 30]; Caldwell, *Tobacco Road* [Deft. Ex. 17, R. 30]; Steinbeck, *Grapes of Wrath* [Deft. Ex. 8, R. 30]; Nabakov, *Lolita* [Deft. Ex. 19, R. 30]; Pennell, *History of Rome Hanks* [Deft. Ex. 20, R. 31]; Voltaire, *Can-*

The testimony of the witnesses established that all of the books introduced into evidence by appellants, books which generally could be found in the public library and on best-seller lists, were substantially more candid in description and representation of sex, and the explicit use of language, than could be found in the books involved in the case. The testimony of the witnesses was that the books offered into evidence by the State contained integrated plots and characters and did not exceed limits of candor or customary freedom of expression in the description or representation of sex [R. 33-34, 35-37, 38-40].

Following the presentation of the aforesaid testimony, appellants rested [Tr. B-136]. The State offered no rebuttal [Tr. B-136].

The District Court rendered a memorandum decision [R. 19-20; Appendix A] on September 19, 1961. The District Court construed the *Roth* test for obscenity as containing four essential ingredients: "average person"; "contemporary community standards"; "dominant theme" and "prurient interests" [R. 19], the first two

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dide [Deft. Ex. 21, R. 31]; Huxley, *Brave New World* [Deft. Ex. 22, R. 31]; Zola, *Nana* [Deft. Ex. 23, R. 31]; Defoe, *Roxana, the Fortunate Mistress* [Deft. Ex. 24, R. 31]; *The Satires of Juvenal* [Deft. Ex. 25, R. 31]; *The Satyricon of Petronius* [Deft. Ex. 26, R. 31]; Farrell, *The Young Manhood of Studs Lonigan* [Deft. Ex. 28, R. 31]; Mykle, *The Song of the Red Ruby* [Deft. Ex. 29, R. 31]; Miller, *Tropic of Cancer* [Deft. Ex. 38, R. 31, Tr. B-117]; Mason, *The World of Suzie Wong* [Deft. Ex. 27, R. 31]. Following the direct testimony of the witness York, counsel for appellants requested permission to withdraw the books which in all but two instances belonged to the public library, and to substitute duplicate copies as quickly as possible. There was no objection [Tr. B-53]. Together with the certified record and the Reporter's Transcripts of the proceedings, the Clerk of the court below has certified the State's Exhibits 1-31, and Defendants' Exhibits 1, 2, 4, 5, 6, 7, 9, 11, 19, 29, 38, now on file in this Court.

ingredients described by the Court to be "impossible as to ascertainment to a certainty" [R. 19].

The District Court stated that the Court would draw a line between the books in question and the books introduced by appellants—that line being "the purpose for which the books were written" [R. 20]. According to the District Court, the "core" of the books in question "would seem to be that of sex, with the plot, if any, being subservient thereto"; the "core" of the books introduced into evidence by appellants "would seem to be the plot, with sex being subservient thereto and only acting as an agent to carry the plot to its intended conclusion" [R. 20].

The District Court stated that the Court had made the *Roth* test operative in the case herein in the following manner: "If the books in question showed to this Court that their dominant purpose was calculated to effectively incite sexual desires and the Court further believed that they would have this effect on the average person residing in this community, then they are not entitled to the protection of the Amendment to the Constitution. This Court believes that the books under indictment here fall within the last statement and are not entitled to the said protection." [R. 20].

A motion for new trial was overruled [R. 20-21]. The order, judgment and decree of the District Court directing the books to be turned over to the Sheriff of Geary County to be destroyed by said Sheriff "upon the further order of this Court" [R. 20] was entered on January 19, 1962 [R. 16]. Execution of the said order of destruction has been stayed by order of the District Court pending final determination of the appeal herein.

On appeal to the Supreme Court of the State of Kansas, appellants renewed all their constitutional claims [R. 51-117], contending that the statute, on its face, and as construed and applied, abridged freedoms of speech and press, deprived appellants of their liberty and property without due process of law, denied the equal protection of the law, deprived appellants of their right to a jury trial, of their right to be secure from unreasonable search and seizure; that there was a failure of proof of the essential ingredients of the offense; that only the local standards of the community had been applied; that the books ordered destroyed were constitutionally protected, all in violation of the "First, Fourth and Fourteenth Amendments to the Constitution of the United States." [R. 57, 70, 83, 98, 108].

The Supreme Court of the State of Kansas affirmed the judgment of the District Court, Justices Price and Robb dissenting without opinion [R. 118-122; Appendix A]. The opinion of the Supreme Court sets forth the memorandum decision of Judge Fletcher, in full [R. 119-120]. The Supreme Court took note of the fact that appellants "are asserting all of the matters urged to the trial court" [R. 120].

The majority opinion recites the search and seizure procedures utilized in the case under the state statute, as heretofore detailed [R. 119]. After then setting forth the memorandum decision of the District Court, the opinion states that the test for obscenity provided in the statute (G. S. 1961 Supp. 21-1102a) is "adequate" and is being applied by the Court [R. 120].

The majority opinion states that the "vital question" is whether the seized books were in fact obscene [R. 121]; that the test for obscenity is not easy to state;

that Irvin S. Cobb once defined obscenity as when "the depth of the dirt exceeds the breadth of the wit" [R. 121].

As to the argument that no evidence was adduced by the prosecution to show comparison of the seized books with other books in common circulation, the opinion of the Court merely states that the District Court pointed out the difference between the seized books and the twenty-nine books taken from the Junction City Public Library [R. 121].

The majority opinion states that the brief submitted by the Attorney General listed the 31 seized books, "the pages upon which the obscenities occur", and a "short description" [R. 121]. The opinion states: "We have checked the cited pages and find that they well bear out the descriptions" [R. 121]. The Court then immediately added that the books as a whole come within the definition "found in paragraph 4 of the syllabus in Roth v. United States" [R. 121].

The Supreme Court stated that the seized books are "hard core pornography", "obscene by the definition found in the Roth case", or "by the definition found in the statute", or "by any other definition" [R. 121].

The Court stated that obscenity is not protected by the "First Amendment nor is it protected by the due process clause of the Fourteenth Amendment" [R. 121]; that there was "no right to a jury trial" [R. 122] because the action grows out of a statute, and no basis existed for a jury at common law. "Amendment VII of the federal constitution" preserves only the right of trial by jury "as it existed at common law" [R. 122], observed the Court.

The Court concluded that the seized books were without "literary merit", were "trash" [R. 122].

The opinion and judgment of the Supreme Court of the State of Kansas was entered on March 2, 1963 [R. 118]. A due and timely motion for rehearing [R. 123-124] again specified all the aforesaid constitutional claims under the "First, Fourth and Fourteenth Amendments to the Constitution of the United States" [R. 123]. The unconstitutional use by the Supreme Court of the "Hickin test" was also urged [R. 123]. The motion for rehearing was denied on April 15, 1963 [R. 126]. The Notice of Appeal to this Court, filed on July 9, 1963 in the Supreme Court [R. 127-135], again detailed the federal questions presented [R. 129-132], and they are renewed in this Jurisdictional Statement. See Question Presented herein.

The Federal Questions Presented Are Substantial.

1. The state statute makes no provision for a jury trial. All of appellants' requests for a trial by jury of the essential issues involved were denied by the District Court, and the ruling of the District Court has been upheld by the court below. Thus, 1,715 books have been ordered destroyed without a determination by a jury that the books go substantially beyond community standards or are otherwise "obscene" under the statute. It is submitted that a federal question of substance is presented.

In *Kingsley Books, Inc. v. Brown,* 354 U. S. 736, the issue was not pressed. Mr. Justice Frankfurter, writing for the majority, stated: "Appellants, as a matter of fact, did not request a jury trial, they did not attack the statute in the courts below for failure to

require a jury, and they did not bring that issue to this Court." (354 U. S. at 443-444.) Here, the constitutional attack on the statute, both on its face and as construed and applied, was duly made throughout the proceedings below, and the question has been appropriately preserved, it is submitted, for determination by this Court.

Mr. Justice Brennan, in *Kingsley Books, Inc. v. Brown,* dissented because "the absence in this New York obscenity statute of a right to jury trial is a fatal defect. . . . A statute which does not afford the defendant, of right, a jury determination of obscenity falls short, in my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene." 354 U. S. at 448. Mr. Justice Douglas' dissent in *Kingsley,* concurred in by Mr. Justice, Black, found the statute to transgress constitutional guarantees because, among other things, the statute "substitutes punishment by contempt for punishment by jury trial". 354 U. S. at 447. In *Times Film Corporation v. City of Chicago,* 365 U. S. 43, Mr. Chief Justice Warren stated: "The inexistence of a jury to determine contemporary standards is a vital flaw." 365 U. S. at 68-69. Mr. Justice Stewart, not a member of this Court when *Kingsley* was decided, stated in *Volanski v. United States,* 246 F. 2d 842 (6th Cir. 1957), as Circuit Judge, that the question of obscenity "is peculiarly one best left for *nisi prius* determination, preferably by a jury" (246 F. 2d at 845). The federal question appears therefore to be one of substantial importance.

That the standards for judging the obscenity of writings must safeguard the protection of freedom of speech and press for material which is not obscene has been constantly affirmed by this Court. *Alberts v. California*, 354 U. S. 476; *Smith v. California*, 361 U. S. 147; *Marcus v. Search Warrants of Property*, 367 U. S. 717; *Manual Enterprises, Inc. v. Day*, 370 U. S. 478; *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58. But the Court has also emphasized that the operation and effect of the method by which speech is sought to be restrained must also be closely analyzed and initially examined. *Speiser v. Randall*, 357 U. S. 513, 520. "We risk erosion of First Amendment liberties unless we train our vigilance upon the method whereby obscenity is condemned no less than upon the standards whereby it is judged." Mr. Justice Brennan in *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 497. The question here is whether the safeguards provided by the free speech and press provisions of the First and Fourteenth Amendment for nonobscene material require a jury trial when it is sought to suppress material as "obscene"; whether the standards enunciated by this Court for judging the obscenity of writings, and the operation of such standards to assure protection for speech and press can effectively satisfy the requirements of the Constitution without a jury determination of "obscenity".

The Court has held that the Fourteenth Amendment does not permit the suppression of a writing unless to the average person, *applying contemporary community standards*, the dominant theme of the material taken as a whole appeals to prurient interest. *Alberts v. California*, 354 U. S. 476, 489. It is this standard

which a majority of the Court in *Alberts* deemed "adequate to withstand the charge of constitutional infirmity." 354 U. S. at 489. It follows therefore, it is submitted, that no book can be suppressed as "obscene" if it does not substantially exceed the limits of candor set by contemporary community standards. If, at the very least, a writing, to the average person in the community, is within customary freedom of expression, a State is manifestly without power to prevent its dissemination. "The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates." Mr. Justice Harlan in *Smith v. California,* 361 U. S. 147, 171. See also, *Manual Enterprises, Inc. v. Day,* 370 U. S. 478, 481-491.

If First Amendment freedoms are to be safeguarded in "obscenity" proceedings; if freedom of expression is to "be ringed about with adequate bulwarks" (*Bantam Books, Inc. v. Sullivan,* 372 U. S. 58, 66) then it is submitted only a jury representing a cross-section of the community should be empowered to decide what the community does or does not tolerate. A jury, in accordance with "our basic concepts of a democratic society and a representative government" is required to be a "body truly representative of the community", a "cross-section of the community," serving only "as instruments of public justice" and not as the "organ of a special class". *Glasser v. United States,* 315 U. S. 60, 85-86. "A jury trial for restrictions on the sale of books", stated Professor Chafee, "is probably required by both sound policy and the constitutional guaranty of the freedom of the press". Free Speech in the United States 539 (1941).

The genesis and evolution of the *Alberts* test for obscenity support the view that a jury trial is required in obscenity actions. In *United States v. Kennerly*, 209 Fed. 119 (S. D. N. Y. 1913), Judge Hand's now familiar dictum "should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now?" was bottomed on the view that "a jury is especially the organ" to rely upon for such determination, 209 Fed. at 120-121. In *United States v. Levine*, 83 F. 2d 156 (2d Cir. 1936), Judge Hand again stressed the requirement of a jury in obscenity actions. "Thus 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premise, but really a small bit of legislation ad hoc, like the standard of care". (83 F. 2d at 157.) Again, during discussion of the Tentative Draft by the American Law Institute, Judge Hand, expressing concern about the "absolute unknown contour" of the obscenity concept, stated that "we must leave it to the jury to say, is this obscene" American Law Institute, *Proceedings, 34th Annual Meeting*, 190-191 (1957).[5]

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[5]Judge Hand's view that a jury in an obscenity action is really engaged in "a small bit of legislation ad hoc," underscores, it is submitted, the constitutional importance of the issue here presented. If the community, in deciding whether it will tolerate a book, is really engaged in lawmaking, who but representatives of the community—the jury—can validly enact the law? This question is posed *arguendo* for appellants do not accept the view that any book in the United States should be at the mercy of a vote of the "common conscience" of the community. See, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638.

Mr. Justice Harlan has noted that the "thoughtful studies" of the American Law Institute reflect a "two-fold concept" of obscenity. *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 485. A book is "obscene" only if, considered as a whole, its predominant appeal is to prurient interest, and if in addition it goes substantially beyond customary limits of candor. A. L. I. Model Penal Code, Proposed Official Draft (May 4, 1962), section 251.4(1). In arriving at this conclusion, the Institute emphasized that an essential issue under its test for obscenity is "the question of customary freedom of expression", and that "jury trial in this field has the merit of requiring unanimous condemnation by this sample of the general population" (A. L. I. Model Penal Code, Tent. Draft No. 6 (1957) 47.)

The background of the *Alberts* test for obscenity, therefore, as well as the opinion itself, supports the view that the "contemporary community standards" element made integral to the test is intended to protect writings tolerated by the community from arbitrary governmental suppression, and that freedoms of speech and press cannot be safeguarded if a cross-section of the community is not permitted to make the determination. There is historical support for this position. One of the objects of the First Amendment, for example, was to abolish the common law doctrine of "seditious libel", together with the then accepted legal view that the jury in such cases could not decide whether the writing was a seditious libel, but only whether the writing was "published". A learned English commentator stated that the doctrine was "wholly subversive of the rights of juries", that "trial by jury was the sole security for the freedom of the press." May, Constitutional His-

tory of England, vol. II (1888) 114. On questions of the extent of "customary freedom of expression", our tradition vests the determination of this question in a jury, not a single judge. Chafee, Freedom of Speech, 19 *et. seq.* (1920); Trial of Peter Zenger, 17 Howell's St. Tr. 675 (1735).[6]

The court below rejected appellants' claimed right to a jury trial, because, stated the court, the action here is civil, not criminal, arises out of statute, without basis in the common law; because the Constitution preserves only the right of trial by jury as it existed at common law [R. 121-122; Appendix A]. But we do not deal here with a suit in equity to restrain a riparian owner, or to tear down a party wall. The *in rem* proceeding was initiated here to destroy books, ordinarily protected from suppression by the provisions of the First Amendment. The framers of the Amendment did not intend to adopt "common law" concepts

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[6]Of course, as with jury questions generally, a trial judge must initially determine that there is a jury question, "i.e., that reasonable men may differ whether the material is obscene." Mr. Justice Brennan, dissenting in *Kingsley Books Inc. v. Brown*, 354 U.S. 436, 448. But a court cannot instruct a jury that a given writing is obscene as a matter of law, "since elements other than the nature of the material itself enter into the determination, particularly the question of customary freedom of expression." A. L. I. Model Penal Code, Tent. Draft. No. 6 (May 6, 1957) 47. An appellate court may for similar reasons, reverse an obscenity judgment if a trial court fails to submit a controverted issue of community standards to a jury, but it may also reverse a jury determination if, in the opinion of the appellate court, reasonable men could not differ on the question of a writing being within the customary limits of candor. For a graphic example of these principles, see *Commonwealth v. Moniz*, 336 Mass. 178, 143 N.E. 2d 196 (1957); 338 Mass. 442, 155 N.E. 2d 762 (1959). And since the issue involves factual matters "entangled in a constitutional claim," the appellate courts, and ultimately this Court, may declare the material constitutionally protected despite the jury determination. *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 488.

with respect to freedom of expression; these common law principles were in many respects "rejected by our ancestors as unsuited to their civil or political conditions." *Grosjean v. American Press Co., Inc.*, 297 U. S. 233, 249. Since the State's power to suppress obscenity is limited by the constitutional protections for free expression, and since, it is submitted, the requirement of a jury trial is integral to the "community" standard for judging obscenity, it does not meet the issue to assimilate common law rules, or the non-existence of common law precedent, to prosecution of books as "obscene" in state *in rem* proceedings. See, *Smith v. California*, 361 U. S. 147, 152-153; *Marcus v. Search Warrants of Property*, 367 U. S. 717, 730-731. The issue is not, whether the Seventh Amendment requires a jury trial in obscenity prosecutions, but whether the First Amendment does so require. That question cannot be decided, it is submitted, by the common law of England.

It is inconsistent with First Amendment principles that a single person should in fact be able to suppress any book or periodical or work of art. See, Chafee, Government and Mass Communications, Vol. I (1947) 218. "A judge in his study surrounded by books may readily get scared about the dangers of the printed page, whereas jurors can be led to consult their own experience and see whether they ever knew anyone who was ruined merely by what he read." Chafee, *supra*, at 221. The *Alberts* test assumedly fashioned a barrier against arbitrary governmental suppression of a book by interposing the judgment of the "community". To substitute a judge for a jury to evaluate and determine whether a book goes beyond community stand-

ards, is essentially to substitute a government official for the representatives of the community and thus to erode the protective barrier.

2. Aside from the absence of a jury provision, the statute, on its face, and as construed and applied, violates the provisions of the First, Fourth and Fourteenth Amendments to the Constitution.

(a) On its face, the statute interdicts "obscene, immoral, lewd or lascivious" books, "manifestly tending to the corruption of morals" (G. S. 1961 Supp. 21-1102(a)). The test to be applied in cases under subsection (a) is whether the effect of the book upon the average person in the community is to arouse "sexual desires or sexually improper thoughts" (G. S. 1961 Supp. 21-1102(b)).

Whenever a judge receives an information, verified "upon information and belief" by the county attorney or attorney general, stating that there is any prohibited book as set out in subsection (a) located within his county, it "should be the duty of such judge" to "forthwith" issue his search warrant directing the seizure of such "prohibited item or items". A copy of such warrant shall be served or posted by the Sheriff at the time of seizure of the material, and shall serve as notice to all interested persons of a hearing to be had "at a time not less than (10) days after such seizure". At the hearing, the judge issuing the warrant shall determine whether the items seized violate the statute. If the judge so finds, he shall order the items destroyed, provided such items shall not be destroyed so long as they may be needed in any criminal prosecution (G. S. 1961 Supp. 21-1102(c)).

The statute at the outset is so broad and so vague and ambiguous in its terminology that it suffers from the double vice of being "capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression" (*Smith v. California*, 361 U. S. 147, 151), and of failing to provide ascertainable standards so that men of common intelligence can determine what is or is not permissible (*Winters v. New York*, 333 U. S. 507). The statute broadly vests in public officials an unrestricted discretion to censor and suppress books. See, *Lovell v. Griffin*, 303 U. S. 444; *Thornhill v. Alabama*, 310 U. S. 88. The statute creates a system of prior restraints of expression, limitless in scope. Such a system "comes to this Court bearing a heavy presumption against its constitutional validity". *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 70.

A standard calling for the suppression of books deemed "immoral" or "manifestly tending to the corruption of morals of persons" fails to provide ascertainable standards and readily sweeps within its ambit constitutionally protected material. *Holmby Productions, Inc. v. Vaughn*, 350 U. S. 870, rev'g 177 Kan. 728, 282 P. 2d 412 (1955); *Musser v. Utah*, 333 U. S. 95, and the subsequent state decision, *State v. Musser*, 118 Utah 537, 233 P. 2d 193; *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684; *Commercial Pictures Corp. v. Regents*, 346 U. S. 587 rev'g 305 N. Y. 336, 113 N. E. 2d 502 (1953). Moreover, when the test to be applied in the use of such aforesaid standards is the effect of arousing "sexual desires" or "sexually improper thoughts", it is impossible to visualize any book that is safe from seizure

and destruction. Mr. Justice Harlan in *Manual Enterprises, Inc. v. Day,* 370 U. S. 478, 487, recognized that many "worthwhile works in literature, science, or art might be claimed to appeal to prurient interest" or stimulate "impure desires relating to sex". See, *Times Film Corp. v. City of Chicago,* 355 U. S. 35, rev'g 244 F. 2d 432, 435 (7th Cir. 1957). The statute here inveighs against any "sexual desire" and "sexually improper thought". What newspaper, book, magazine or other writing is safe under such vagrant and ambiguous standards, this wholly apart from the further question of the power of a State to suppress writings which arouse a sex desire or a naughty thought?

Nor was the construction of the statute by the courts below restrictive of the statutory language. The District Court declared that if the books in question showed "this Court" that their dominant purpose was "calculated to effectively incite sexual desires", and the court believed that the books would have this effect "on the average person residing in this community", then the books "are not entitled to the protection of the Amendment to the Constitution" [R. 120; Appendix A]. The majority opinion of the court below, after reciting the District Court's decision with manifest approval, avowed that "the test for obscenity is not easy to state"; then quoted Irvin S. Cobb's definition of obscenity, and then affirmed the suppression of the books "by the definition found in the Roth case, or by the definition found in the statute or by any other definition" [R. 121; Appendix A].

The statute on its face thus imposes prior restraint on the dissemination of writings in violation of the

First and Fourteenth Amendments. None of the safeguards found in the New York statute approved in *Kingsley Books, Inc. v. Brown*, 354 U. S. 436 appear in the statute. Here the proceedings are initiated solely by an information verified "upon information and belief." *Cf. Rice v. Ames*, 180 U. S. 371, 374. No copies of the publications alleged to be "immoral" and manifestly tending to the "corruption of morals" by arousing "sexual desires" and "sexually improper thoughts" are required to be submitted to the judicial officer before issuance of the warrant of seizure. In the light of the broad language of the statute, and the authorization to issue a warrant based on "information and belief", the statute authorizes a mass seizure and the removal of a broad range of writings from circulation.

There is no provision for any adversary proceeding on the issue of unlawfulness of the material prior to seizure. The statute effectively cuts off the circulation of the material and the public's access to the writings without any prior determination that the material is not entitled to constitutional protection. The judicial officer is under a duty to issue the warrant, and a hearing can be held "not less than" ten days after seizure. There is no limitation on the time within which a decision must be made. The statutory procedures here are permeated with even more constitutional infirmities than in *Marcus v. Search Warrants of Property*, 367 U. S. 717.

Moreover, the statute, by the breadth of its terms and the vagueness of its language, authorizes the issuance of general warrants against writings, and permits the arbitrary search for and seizure of all media

of communication. As such, the statute runs afoul of both the First and Fourth Amendments, subsumed into the due process clause of the Fourteenth Amendment. See, *Mapp v. Ohio,* 367 U. S. 643; *Near v. Minnesota,* 238 U. S. 697.

(b) The statute, as applied to the books herein involved, also violates the constitutional provisions aforestated. It should be noted that only seven books were presented to the District Judge. The prosecutor, by notations, guided the Judge to the reading of excerpts in the books. Thus, the *Hicklin* method of judging the obscenity of writings was employed, despite the rejection of such method by this Court in *Alberts* "as unconstitutionally restrictive of the freedoms of speech and press". 354 U. S. 476, 489.

The District Judge refrained from stating that he had read the books in their entirety; he had only "scrutinized" them. The record shows that only about ¾ of an hour was consumed in such "scrutiny". Thus, as to the seven books, there was no attempt made, nor was there time, to determine the "dominant theme" of each of the books, "taken as a whole". See, *People v. Bantam Books (People v. Carr),* 9 Misc. 2d 1064, 172 N. Y. S. 2d 515 (19[illegible]).

The determination to issue the warrant was based upon the said scrutiny of the seven books, upon which basis the District Judge concluded that "any" publication bearing the imprint "This is an original Night Stand Book" *would* violate the statute. The warrant therefore authorized a broad, exploratory search, and wholesale seizure of books bearing the publisher's imprint aforestated.

Pursuant to such warrant, the executing officer did in fact seize and remove 1,715 books, of which there was 31 different and specific titles. The warrant of seizure, issued on July 25, 1961 and executed on July 26, 1961, gave notice of a hearing to be held on August 7, 1961. The motion to quash was filed on the said day, and decision denying the motion was rendered on August 11, 1961. While it is true that appellants were compelled to seek a continuance of the hearing thereafter on the merits in order to properly prepare their defenses against such wholesale seizure, it appears clear, it is submitted, that there was in this case a "thoroughgoing and drastic restraint" on the circulation of books. *Marcus v. Search Warrants of Property*, 367 U. S. 717. See also, *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 518-519; *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58. Moreover, no jury determination was ever made that the books exceeded community standards, and the writings are still suppressed.

It is submitted that these federal questions are substantial. If a judicial officer, after reading, or scrutinizing, a specified number of books published by the "Richard Roe Publishing Co.", can thereafter decide that *all* books published by the "Richard Roe Publishing Co." "would" be "obscene", "immoral", "corruptive of morals", conducive to "sexual desires" and "sexually improper thoughts," and then issue a search warrant authorizing the seizure of all books published by the "Richard Roe Publishing Co.", it appears clear, it is submitted, that a way has been found for emasculating the provisions of the First and Fourth Amendments. The statute, on its face, and as applied, is merely

"an agency" for the suppression of constitutionally protected material. *Bantam Books, Inc. v. Sullivan,* 372 U. S. 58, 72.

3. The statute, as construed and applied to the books herein, permits the suppression of books without proof that the writings exceed contemporary community standards.

(a) This omission of proof creates a serious constitutional infirmity in the law because evidence that a writing goes beyond customary limits of candor is an essential element of the test for obscenity; because the ingredient of "community standards" was made a part of the test "to tighten obscenity standards"; and because without such evidence, liberty and property, as in the case herein, can be lost without due process of law, and freedoms of speech and press abridged. *Mannual Enterprises, Inc. v. Day,* 370 U. S. 478, 482-488; *Thompson v. City of Louisville,* 362 U. S. 199; *Schware v. Board of Bar Examiners,* 353 U. S. 232; *Garner v. Louisiana,* 368 U. S. 157.

Not only did the State fail to offer any proof that the books herein involved go substantially beyond the limits of candor in description or representation of sex, but the record makes abundantly clear that such proof was purposefully omitted as not constitutionally required. According to the State, in order the prove "community standards", it would be necessary to produce an indefinite number of witnesses in order to distill the viewpoint of the "average man" in Junction City [Tr. B-17]. This, the State averred, is an impossibility. But, affirmed the State, the *District Judge,* a resident of the community, could determine in his own mind "what is an average person in the community, because

the State could never establish this by any stretch of the imagination" [Tr. B-20-21]. All of this was proper, asserted the State, because the issue of community standards "is a matter of law [Tr. B-18].

As heretofore demonstrated, the issue of contemporary community standards involves factual matters entangled in a constitutional claim. A single Judge is not the "average man" in a community, nor does he represent "community standards", nor, it is submitted, can a State constitutionally create a single Judge as the embodiment of community standards. Such exercise of State power is both arbitrary and capricious. See Chafee, Government and Mass Communications, Vol. 1 (1947), 218-221. The argument of the State here that proof is impossible to adduce on the issue of community standards is without substance, first, because it is based on the erroneous view that community standards is solely a question of law, and second, because there are means available to prove community standards without gathering all the "average" men in the community as witnesses. See *Smith v. California*, 361 U. S. 147, 164-167, 171-172.

(b) While the State made no attempt to prove that the books herein go beyond contemporary community standards, the appellants, without rebuttal on the part of the State, proved that the books do not exceed the community limits of candor in description or representation of sex. This was done through expert testimony, and by the introduction into evidence of comparable books openly appearing in the public libraries, and sold and purchased in the community, and receiving wide general acceptance. If it is a denial of due process of law to make a finding of statutory violation

without evidentiary support, it would appear to compound the constitutional infirmity to make a finding of "obscenity" when the only uncontradicted evidence in the record shows that the statute is not violated. See, *Garner v. Louisiana,* 368 U. S. 157.

Moreover, the evidence of wide acceptance of comparable material offered by appellants was arbitrarily disregarded by the District Court, upheld by the court below, upon invalid grounds. The District Court held [R. 14; Appendix A] that the difference between the books in question and the comparable material offered into evidence by appellants was their "purpose", to wit, that "sex" was "subservient" to the plot in the comparable writings, while in the books in question, the plot was subservient to sex. Wholly apart from the merits of the District Court's literary criticism, it is submitted that the Court overlooked the essential relevance of the testimony. The issue before the Court was whether the comparable material, widely accepted in the community, did not in fact exceed, in candor of language and description and representation of sex, the books in question. Clearly, if the books in question did not go beyond the customary freedom of expression found in other writings tolerated in the community, then the books in question could not be held to exceed contemporary community standards. Whether sex was subservient to the plot of a book, or a plot subservient to sex, was not the issue.

The result of the action of the courts below is this: first, there is no finding in the record that the books herein exceed community standards (nor any evidence to support such a finding); and second, the appellants were essentially deprived of the right to present rele-

vant evidence in defense of the books. In both respects, the due process provisions of the Fourteenth Amendment were violated. *Thompson v. City of Louisville,* 362 U. S. 199; *Smith v. California,* 361 U. S. 147, 164-166, 171-172; *In re Harris,* 56 Cal. 2d 836, 366 P. 2d 305, 16 Cal. Rptr. 889 (1961); *Cf. State of Florida v. United States,* 282 U. S. 194, 215. The books herein face destruction solely because of a ruling that the books allegedly incite "sexual desires". See *Manual Enterprises, Inc. v. Day,* 370 U. S. 478, 486.

4. The books herein were ordered destroyed because of their alleged "effect on the average person residing in this community" [R. 120; Appendix A]. In short, the trier of the facts, upheld by the court below, condemned these books solely because the writings allegedly incited sexual desires in the average person of "Junction City, Kansas".

The adoption by the courts below of the geographical area of Junction City, Kansas as the community by which to determine the claims of constitutional protection for the writings, is violative of the free speech and press provisions of the First and Fourteenth Amendments, it is submitted.[7]

The First Amendment does not permit, it is submitted, the suppression of books merely because they may be deemed offensive by a local community. "The Constitution is not geared to patchwork geography. It tolerates no independent enclaves." *Christian v. Jemison,* 303 F. 2d 52, 55 (5th Cir., 1962).

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[7]A similar constitutional issue is pending before this Court in a number of cases: *Smith v. California,* Oct. Term, 1963, No. 72; *Jacobellis v. Ohio,* Oct. Term, 1962, No. 164; *Williamson v. California,* Oct. Term, 1962, No. 948, cert. pending; *Wenzler v. California,* Oct. Term, 1962, No. 969, cert. pending.

The standards for judging obscenity formulated by this Court were clearly intended, it is submitted, to restrict the opportunities for suppression of writings in the United States. The Court has constantly held that the protections of the First Amendment are equally provided with the same force and effect in the Fourteenth Amendment. *Marsh v. Alabama,* 326 U. S. 501, 511; *Kingsley International Pictures Corp. v. Regents,* 360 U. S. 684. If these protections are to be safeguarded, it would appear essential that there be a national standard for the judging of obscenity. If the Nation as a whole tolerates a writing, thus affording the writing First Amendment protection, it cannot be the right of a local community, it is submitted, to burn the book as "obscene". Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 Minn. L. Rev. 5, 108-114 (1960). Since the inevitable tendency of the "local standards" test is to reduce the reading of books of general circulation to the level of reading of the most censorious local community, the public's access to ideas disseminated in all media of communication would be plainly diminished. See, *Butler v. Michigan,* 352 U. S. 380; *Smith v. California,* 361 U. S. 147.

The power of a local community to deal with "obscenity" is not curtailed in legal concept by a constitutional requirement that the trier of the facts measure the protection to which the book is entitled by the standards of the national community. The police power of a State or any local subdivision thereof is always limited, in any area, by the free speech and press, due process, and equal protection provisions of the Fourteenth Amendment. *Talley v. California,* 362 U. S. 60;

Chambers v. Florida, 309 U. S. 227; *Baker v. Carr*, 369 U. S. 186.

There is a two-fold requirement of proof with respect to "community standards" in obscenity prosecutions, if First Amendment guarantees are to be assured. First, the proof should show that the writing goes beyond the standards of the local community. Clearly, if the writing does not, that is the end of the matter. And of course, a local community may always permit a broader area of freedom of expression than even the First Amendment assumedly protects. See, *State v. Nelson*, 168 Neb. 394, 95 N. W. 2d 679 (1959). Secondly, the proof should show that the writing exceeds the contemporary standards of the country generally. Without such additional proof, the constitutional protection for writings which are not obscene is abridged.

We are not without precedent on this issue. In the naturalization field, where questions of free speech and press were not even involved, the courts accepted the view that "in order to determine whether a petitioner has met his burden of establishing that he is a person of good moral character . . . we should see if the petitioner's character coincides with the generally accepted mores or standards of the average citizen of the community in which the petitioner resides. . . . If the petitioner's conduct fails to satisfy the community test, then we should see whether the 'common conscience', when it is possible of being ascertained, of the community as a whole also looks disfavorably upon such conduct." *In re Mayalls Naturalization*, 154 F. Supp. 556, 560 (E.D. Pa. 1957), opinion by Chief Judge Ganey. See also, *In re Naturalization*

of Spak, 164 F. Supp. 257, 259-260 (E.D. Pa. 1958). Such a two-fold requirement safeguards personal and societal interests protected by the Bill of Rights. A lesser requirement creates "intolerable consequences" and encounters, it is submitted, "constitutional barriers." *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 487, 488.

5. The statute, as applied to the books here involved, violates the free speech and due process provisions of the First and Fourteenth Amendments.

(a) Since books may not be suppressed unless the evidence establishes clearly and unequivocally that to the average person, the dominant theme of each of the writings, taken as a whole, applying contemporary community standards, appeals to the prurient interest and is utterly without redeeming social importance, it is clear that the judgment of destruction here cannot stand, it is submitted. This because, as aforestated, there is no proof, and there was no attempt to prove, that the books exceed contemporary standards. Moreover, appellants' expert witnesses, and comparable material obtained from the public libraries, established, without rebuttal, that the books in question do not go beyond the limits of candor in description and representation of sex and nudity. Since the Constitution requires proof of the "corruptive effect" of the writings, and, *in addition*, proof that the writings go substantially beyond customary freedom of expression in the various media of communication (*Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 483-491), the order for the destruction of the books as violative of the state statute is constitutionally impermissible.

(b) In the constitutional sense, the books cannot be held to go substantially beyond limits of candor in description and representation of sex and nudity. They clearly do not go beyond customary limits of expression in language or theme—indeed, they are far more muted —than many of the "best-sellers" in the literary world and in other media of communication, such as the motion pictures, television and the arts. Neither in language nor in theme do the books herein approach the candor of discussion, the explicitness of language, that is found in writings of noted authors generally accepted and widely read by the public.

The aforesaid is demonstrated, it is submitted, by comparing the books herein with such works as Lawrence, *Lady Chatterley's Lover* [Deft. Ex. 1, R. 29], where the descriptions of sexual activity are candid and the language used, explicit; Wilson, *Memoirs of Hecate County* [Deft. Ex. 2, R. 29], the stories of residents of a suburban community with detailed descriptions of sexual intercourse; Wallace, *The Chapman Report* [Deft. Ex. 4, R. 29], detailed description and representation of sexual activities; O'Hara, *From the Terrace* [Deft. Ex. 5, R. 29], explicit sexual scenes and language throughout the story; Metalious, *Peyton Place* [Deft. Ex. 6, R. 29], replete with realistic language and incidents involving rape, incest, sexual deviations, nymphomania and other sexual aberrations; O'Hara, *Ten North Frederick* [Deft. Ex. 7, R. 30], depicting in detail the sexual activities, marital and extra-marital, of a middle-aged Pennsylvania lawyer; Jones, *From Here to Eternity* [Deft. Ex. 9, R. 30], a realistic story of army life in Hawaii; Mergendahl, *The Bramble Bush* [Deft. Ex. 11, R. 30], a detailed

account of murder, adultery and seduction in a small New England town; Nabakov, *Lolita* [Deft. Ex. 19, R. 30], the tale of a continuous seduction of or by a twelve-year old girl by or with a middle-aged lover; Mykle, *Song of the Red Ruby* [Deft. Ex. 29, R. 31], graphic and explicit sexual descriptions throughout the writing.

These books, and many others, it should be recalled, were all in the public library of Junction City. There can be little dispute that the characteristics of the writings of the twentieth century are their realism, their naturalism. Descriptions of physical relations in such works "appear as regular staples of literary diet". *Grove Press, Inc. v. Christenberry,* 276 F. 2d 433, 438 (2d Cir. 1960). Candor in theme and language is now accepted by the general public, not only in books but in the visual arts as well. See, for example, *Cat on a Hot Tin Roof,* a motion picutre depicting a wife trying to re-establish sexual relations with her husband, who is suspected of being a homosexual; *Tea and Sympathy,* a married woman helps a young student attain his manhood; *The World of Susie Wong,* a story of the world of prostitution; *The Revolt of Mamie Stover,* a prostitute struggles against Army restrictions; *The Apartment* (Oscar Winner), describing the extra-marital philanderings of the "organization man".

Measured by the standards of customary freedom of expression in the country today, the books herein are clearly not obscene, it is submitted.

(c) The court below described the books as "trash" and without "literary merit" [R. 122; Appendix A]. Neither of these appellations, it is submitted, are ap-

propriate standards for denying constitutional protection to the writings. If the present, as well as the future, worlds of literature and the arts are to survive, it is unacceptable, it is submitted, to deny constitutional protection to books denoted as non-literary or valueless. It has become almost a truism that the "trash" of today is the "classic" of tomorrow. "What appeared daring and deserving of censorship in one decade becomes commonplace in the next". Cyc. of Soc. Sciences, Censorship, Vol. III, 294.

Thus, this Court has repeatedly warned that the content of writings which may be suppressed is extremely limited, not to be measured by subjective reactions to disagreeable themes or candid expression. To summarize: The guarantees of the First and Fourteenth Amendments apply equally to material designed to entertain or amuse as to scientific or educational writings. *Winters v. New York,* 337 U. S. 507. A writing is not to be deemed obscene because "it does not conform to some norm prescribed by an official", or because not in "good taste," or because it is not "good literature", or because it does not have "educational value", or because it is not "refined", or because it has no "enduring values", or because it is allegedly "trash". *Hannegan v. Esquire,* 327 U. S. 146. A communication is entitled to constitutional protection even if public officials deem it "sacriligious". *Joseph Burstyn, Inc. v. Wilson,* 343 U. S. 495; or "prejudicial to the best interests of the people". *Gelling v. Texas,* 343 U. S. 960; or "immoral", "harmful", "non-educational" and "non-amusing". *Superior Films, Inc. v. Dept. of Education (Commercial Pictures Corp. v. Regents),* 346 U. S. 587; or "obscene, indecent and

immoral", *Holmby Productions, Inc. v. Vaughn,* 350 U. S. 870; or offensive to a "sense of propriety, morality and decency". *Mounce v. United States,* 355 U. S. 180; or because it "attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry". *Kingsley Int'l Pictures Corp. v. Regents,* 360 U. S. 684; or because it arouses "sexual desires". *Times Film Corp. v. City of Chicago,* 355 U. S. 35; or because it advocates and depicts nudism and nudity. *Sunshine Book Co. v. Summerfield,* 355 U. S. 372; or allegedly promotes "lesbianism" and "homosexuality" *One, Inc. v. Olesen,* 355 U. S. 371.

Moreover, Sex is not obscenity (*Alberts v. California,* 35 U. S. 476), and the label of "hard core pornography" cannot be attached to writings which society generally tolerates. *Manual Enterprises, Inc. v. Day,* 370 U. S. 478, 489-490.

The federal question relative to the constitutional protection afforded the books in question is substantial, it is submitted.

Conclusion.

It is submitted that the questions presented by this appeal are substantial and of public importance, requiring review by the Court.

Respectfully submitted,

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APPENDIX A.

Opinion and Judgment of the Supreme Court of the State of Kansas.

State of Kansas, Appellee, v. A Quantity of Copies of Books, Harold Thompson and Robert Thompson, d/b/a P-K NEWS SERVICE, Appellants.

No. 42,829

SYLLABUS BY THE COURT

In a proceeding in rem for the confiscation of thirty-one named paper-back books, it is determined that the said books were obscene and subject to seizure and destruction.

Obscenity has no constitutional protection as to free speech by either the federal or state constitutions.

There was no right to a jury trial in the above case, since there was no basis at common law for the within action.

Appeal from Geary district court; A. B. Fletcher, Jr., Judge. Opinion filed March 2, 1963. Affirmed.

Robert A. Schermerhorn, of Junction City, and *Stanley Fleishman,* of Hollywood, California, argued the cause and *C. L. Hoover* and *William R. King,* of Junction City, were with them on the briefs for the appellants.

William M. Ferguson, attorney general, argued the cause and Robert E. Hoffman, assistant attorney general, and *William Clement,* county attorney, were with him on the briefs for the appellee. The opinion of the court was delivered by

JACKSON, J.: On July 24, 1961, William M. Ferguson, attorney general of Kansas, brought an action

under the new statute which had recently been passed by the Kansas legislature in relation to obscene books and writings. He thereupon caused to be filed before the district judge in Geary county at Junction City, the county seat, an information setting out that the P-K News Service of that city had in stock and possession a quantity of paper-back books which were named in the information. We are told that the judge was given seven copies of the books for perusal before issuing the warrant for seizure. The judge's remarks about his reading of the books may be found in the transcript of the proceedings of July 25, 1961. The court did not delay in issuing the warrant under section 4 of Laws of 1961, ch. 186. (Now also found in G.S. 1961 Supp. 21-1102c.)

Thereafter, the sheriff of Geary county was given a search warrant and notice of hearing. Harold Thompson and Robert Thompson, owners of the P-K News Service, were given notice to appear on August 7, 1961 to determine whether the books seized were obscene. After serving the warrant, the sheriff reported and certified that he had found 1715 individual copies of the paper-back books.

On August 7, 1961, the interveners—now appellants—filed a motion to quash. The court heard arguments on this motion on August 7, and on August 11, denied the motion to quash. On August 8, the appellants moved for a continuance. This motion was granted and the court continued the case until September 14. On September 6, appellants moved that they be granted a jury trial. This was denied. Thereafter, the matter was tried to the court, and the court handed down a short memorandum opinion on September 19,

1961. We are setting out the opinion here as the clearest way of showing what the trial court thought about the case:

"MEMORANDUM DECISION

(Filed September 19, 1961)

"The sole question before the Court at this time is whether the books in question, as shown in the warrant issued by this Court, are obscene literature as defined in Chapter 186 of the Session Laws of the State of Kansas, 1961.

"The test to be employed under our law is taken directly from an instruction approved by the Supreme Court of the United States in the case of Roth vs. the United States, which was decided together with Albert vs. State of California in 354 U. S. 476, 1 L. Ed. 2d 1498 (sic.), 77 S. Ct., 1304. This Court must then look to these two decisions.

"The test of obscenity as laid down by the Court in the Roth case is as follows: 'Whether to the *average* person, employing *contemporary community standards,* the *dominent theme* of the material taken as a whole appeals to prurient interests.'

"The four words or phrases italicized above form the yardstick by which these books are to be judged. The first two are impossible as to ascertainment to a certainty. The 'dominent theme' of the book is antonymous to 'isolated excerpts'. Webster's New World Dictionary of the American Language, College Edition (1960), defines 'prurient' as follows: '1. Having lustful ideas or desires. 2. Lustful, lascivious, lewd; as, prurient longings. 3. Itching.'

"The Court approved as a further guide the definition of obscenity in the Model Penal Code, Section 207. 10(2), as follows: 'A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond the customary limits of candor or representation of such matters.'

"This Court has further kept in mind, based upon the above decisions, that sex and obscenity are not synonymous.

"This Court would draw a line as between the books in question here and the books introduced by the intervener, that being the purpose for which the books were written. In the case of the books introduced into evidence by the intervener, the core of the said books would seem to be the plot, with sex being subservient thereto and only acting as an agent to carry the plot to its intended conclusion, while in the books in question, the core would seem to be that of sex, with the plot, if any being subservient thereto.

"This Court has made the rule of the Roth case, and the test as set forth in the law in question, operative in this case in the following manner: If the books in question showed this Court that their dominant purpose was calculated to effectively incite sexual desires, and the Court further believed that they would have this effect on the average person residing in this community, then they are not entitled to the protection of the Amendment to the Constitution. This Court believes that the books under indictment here fall within the last

statement and are not entitled to the said protection

"It Is Therefore Ordered, Adjudged, and Decreed that the books in question are found to be in violation of Chapter 186 of the Session Laws of the State of Kansas, 1961, and shall be turned over to the Sheriff of Geary County to be destroyed by said sheriff upon the further order of this Court."

Appellants have now appealed to this court and are asserting all of the matters urged to the trial court.

Turning to the statute (G. S. 1961 Supp. 21-1102a) we readily see that the first section contains a definition of obscenity. We believe that the test for obscenity which is provided is adequate and we are applying it in this case.

It would seem that the vital question is whether these seized books were in fact obscene. The test for obscenity is not easy to state. It is said that Irvin S. Cobb was once called as an expert witness in a case of claimed obscenity. He was asked to give a definition of obscenity. His answer was: "If the depth of the dirt exceeds the breadth of the wit, then in my opinion the book is obscene."

Appellants argue that there was no evidence showing comparison of the seized books with other books in common circulation. The trial court did point out the difference between the seized books and some twenty-nine others that were taken from the Junction City public library.

The attorney general's brief contains a section in which each of the thirty-one seized books is listed by

name and then the pages upon which obscenities occur are given along with a short description. We have checked the cited pages and find that they well bear out the descriptions. We would certainly agree that the books as a whole come within the definition found in paragraph 4 of the syllabus in *Roth v. United States*, 354 U. S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304, where it is said:

> "(a) Sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest—*i.e.*, material having a tendency to excite lustful thoughts." (P. 477.)

We are of the opinion that the seized books are in fact hard core pornography. We feel certain that young G.I.'s from Fort Riley—many of whom frequent Junction City—would be of the same opinion. We believe that the seized books are obscene by the definition found in the *Roth* case, or by the definition found in the statute or by any other definition.

We shall now answer briefly certain other matters. First of all, obscenity is not protected by the First Amendment of the Constitution of the United States nor is it protected by the due process clause of the Fourteenth Amendment nor, of course, under section 11 of our own Bill of Rights to the Constitution of Kansas, see *Roth v. United States*, supra.

The present case is not a criminal case but a civil case. The appellants are claiming that they had a right to a jury trial. If that were true, appellants would have to point out what form of action at common law formed the basis for the present suit. Both the

provision in section 5 of the Bill of Rights of the state constitution which reads: "The right of trial by jury shall be inviolate" and Amendment VII of the federal constitution preserve only the right of trial by jury as it existed at common law. This action grows out of a statute, and we know of no basis for it at common law. Therefore, there was no right to a jury trial.

We believe that the currently seized books are only attempts to carry pornography to the "nth" degree; that smut and obscenities seem to be the chief purpose of the books; that the story—what there is of it—is simply a framework upon which to hang the pornography. Certainly there is no literary merit in the thirty-one books seized. They are trash.

Having considered all matters raised in this case, the order will be made to affirm the trial court's ruling.

It is so ordered.

Price and Robb, *JJ.*, dissent.

Filed March 2, 1963.

APPENDIX B.

Constitutional Provisions and Statutes Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The provisions of the Fourth Amendment to the United States Constitution are:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. The provisions of the general statutes of Kansas (G. S. 1961 Supp., §21-1102; L.1961, ch. 186, §1; June 30) are:

> "(a) Any person who shall import, print, publish, sell, design, prepare, loan, give away or distribute any book, magazine, newspaper, writing, pamphlet, ballad, printed paper, print, picture,

drawing, photograph, publication or other thing, containing obscene, immoral, lewd or lascivious language, or obscene, immoral, lewd or lascivious prints, pictures, figures or descriptions, manifestly tending to the corruption of the morals of persons, or shall introduce into any family, school or place of education or shall buy, procure, receive or have in his possession, any such book, pamphlet, magazine, newspaper, writing, ballad, printed paper, print, picture, drawing photograph, publication or other thing, either for the purpose of sale, exhibition, loan or circulation, or with intent to introduce the same into any family, school or place of education, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five (5) nor more than three hundred dollars ($300), or be imprisoned not to exceed thirty (30) days, or both.

"(b) The test to be applied in cases under subsection (a) of this section shall not be whether sexual desires or sexually improper thoughts would be aroused in those comprising a particular segment of the community, the young, the immature or the highly prudish, or would leave another segment, the scientific or highly educated or the so-called worldly wise and sophisticated, indifferent and unmoved. But such test shall be the effect of the book, picture or other subject to complaint considered as a whole, not upon any particular class, but upon all those whom it is likely to reach, that is, its impact upon the average person in the community. The book, picture or other subject of complaint must be judged as a whole in

its entire context, not by considering detached or separate portions only, and by the standards of common conscience of the community of the contemporary period of the violation charged."

5. The provisions of the general statutes of Kansas (G. S. 1961 Supp. §21-1102(c); L. 1961, ch. 186, §4; June 30) are:

"Whenever any district, county, common pleas, or city court judge or justice of the peace shall receive an information or complaint, signed and verified upon information and belief by the county attorney or the attorney general, stating there is any prohibited lewd, lascivious or obscene book, magazine, newspaper, writing, pamphlet, ballad, printed paper, print, picture, motion pictures, drawing, photograph, publication or other thing, as set out in section 1 [21-1102] (a) of this act, located within his county, it shall be the duty of such judge to forthwith issue his search warrant directed to the sheriff or any other duly constituted peace officer to seize and bring before said judge or justice such a prohibited item or items. Any peace officer seizing such item or items as hereinbefore described shall leave a copy of such warrant with any manager, servant, employee or other person appearing or acting in the capacity of exercising any control over the premises where such item or items are found or, if no person is there found, such warrant may be posted by said peace officer in a conspicuous place upon the premises where found and said warrant shall serve as notice to all interested persons of a hearing to be had at a time not less than ten (10) days after such

seizure. At such hearing, the judge or justice issuing the warrant shall determine whether or not the item or items so seized and brought before him pursuant to said warrant were kept upon the premises where found in violation of any of the provisions of this act. If he shall so find, he shall order such item or items to be destroyed by the sheriff or any duly constituted peace officer by burning or otherwise, at such time as such judge shall order, and satisfactory return thereof made to him: *Provided, however,* Such item or items shall not be destroyed so long as they may be needed as evidence in any criminal prosecution."